Supreme Court, U.S.
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No. 02-931

In the
# Supreme Court of the United States

AIRSTAR HELICOPTERS, INC.,
*Petitioner,*
v.
FEDERAL AVIATION ADMINISTRATION; JANE F. GARVEY, Administrator of the Federal Aviation Administration; UNITED STATES DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA, Secretary of the United States Department of Transportation; NATIONAL PARK SERVICE; ROBERT L. ARNBERGER, Superintendent of the Grand Canyon National Park; FRAN P. MAINELLA, Director of the National Park Service; UNITED STATES DEPARTMENT OF THE INTERIOR; GALE A. NORTON, Secretary of the United States Department of the Interior; THE UNITED STATES OF AMERICA; and HUALAPAI INDIAN TRIBE,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION FOR HUALAPAI INDIAN TRIBE

GLENN M. FELDMAN
*Counsel of Record*
MARISCAL WEEKS McINTYRE & FRIEDLANDER, P.A.
2901 N. Central Avenue, Suite 200
Phoenix, Arizona 85012
(602) 285-5138
Attorneys for Hualapai Indian Tribe

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## QUESTIONS PRESENTED

1. Whether *Morton v. Mancari*, 417 U.S. 535 (1974) and its progeny, which have clearly and consistently distinguished Indian tribal preferences from racial classifications, were overruled *sub silentio* by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which involved racial classifications and which did not involve or mention Indian tribes.

2. Whether the Federal Aviation Administration and the National Park Service acted lawfully by adopting a regulation exempting air tour flights to and from the Hualapai Indian Reservation from a numerical limit on such flights in order to fulfill the federal government's trust obligation to protect the economic security of the Hualapai Indian Tribe.

## PARTIES TO THE PROCEEDING

The Hualapai Indian Tribe was a defendant-intervenor in the court below and is a respondent here. The caption of the petition for writ of certiorari failed to name the Tribe as a respondent. The caption of this brief in opposition includes the Hualapai Indian Tribe as a named respondent.

The Hualapai Indian Tribe is a federally recognized tribal government that occupies the Hualapai Indian Reservation adjacent to Grand Canyon National Park in Arizona.

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## STATEMENT OF THE CASE

On April 4, 2000, the Federal Aviation Administration ("FAA") and the National Park Service ("NPS") issued a final rule entitled "Commercial Air Tour Limitations in the Grand Canyon National Park Special Flight Rules Area" (the "Limitation Rule"), 65 Fed. Reg. 17,708-17,733; Petitioner's Appendix F. The Limitations Rule implemented, in part, the National Parks Overflights Act, 16 U.S.C. § 1a-1, note Sec. 3; Petitioner's Exhibit B.

The Limitations Rule, among other things, limited the number of air tours in and over the Grand Canyon that commercial air tour operators could provide. At the same time, the Rule exempted from this limit all flights to and from the Hualapai Indian Reservation, provided that the air tour operator had entered into a written contract with the Hualapai Indian Tribe authorizing access to the Hualapai Indian Reservation for that purpose. 14 C.F.R. § 93.319(f)(2); Petitioner's Appendix at F-102 to 103. This provision is referred to herein as the "Hualapai exemption."

The agencies incorporated this exemption into the Limitations Rule after carefully evaluating the factual and legal record developed during the rulemaking process. The agencies consulted with ten different Indian tribes potentially affected by the proposed rule. Petitioner's Appendix at F-31. As a result of this process, the agencies determined that only the Hualapai Tribe's economy was largely based on tourism provided by air tour operations and that a significant number of tribal members were employed in tourism-related businesses. Petitioner's Appendix at F-28 to 29, F-31 to 32, F-44 to 45, F-74 to 75. The agencies concluded that the proposed rule "would

significantly adversely impact the Hualapai Tribe's economic development and self-sufficiency," *id.* at F-31, and that "the direct impact to the Tribe is more severe than initially believed." *Id.* at F-75.[1] As a result, the agencies determined that it was both necessary and appropriate to exempt air tours to and from the Hualapai Reservation in the final rule. They did so in order to comply with the federal government's unique but well-established trust responsibility to Indian tribes; an obligation that is intended to foster and protect tribal economic development and self-sufficiency. *Id.* at F-31 to 32, F-44. Accordingly, the final Limitations Rule included the Hualapai exemption.

Petitioner and several other air tour operators challenged this provision of the final rule, asserting equal protection and other theories. The court of appeals addressed and rejected those arguments in a footnote. Petitioner's Appendix at A-24, n. 8. It is this footnote that petitioner asks the Court to review in this proceeding.

## SUMMARY OF ARGUMENT

For almost thirty years—since *Morton v. Mancari*, 417 U.S. 535 (1974)—this Court has carefully distinguished Indian tribal preferences from racial classifications. Special treatment for Indian tribes has been consistently upheld under the United States' unique trust relationship with tribal governments, and such preferences have been determined to be "political rather than racial in nature." *Id.* at 553, n. 24. The constitutionality

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[1] The agencies also noted that that Hualapai Tribe does not operate a tribal casino, making the Tribe's reliance on tourism revenue even more critical. Petitioner's Appendix at F-28.

of these tribal preferences is determined under a "rational relationship" standard.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court determined that a strict scrutiny standard was to be used in analyzing equal protection claims involving purely racial classifications. *Adarand* did not involve, or even mention, Indians or tribal preferences. The petition nevertheless asks this Court to hold that *Adarand* overruled *Mancari* and its progeny *sub silentio* and that Indian tribal preferences must now be analyzed under strict scrutiny.

The Court should deny the petition. The unique structure of the Hualapai preference at issue in this case benefits, rather than harms, petitioner. As a result, this case would not be an appropriate vehicle for an analysis of equal protection issues. In addition, the decision of the court below is consistent with the well-established law in this area and does not conflict with any decision of this Court or of any other court of appeals.

## ARGUMENT

### I. PETITIONER IS NOT INJURED, IN CONSTITUTIONAL OR PRACTICAL TERMS, BY OPERATION OF THE HUALAPAI EXEMPTION

As a threshold matter, it is not clear that petitioner has been harmed by operation of the Hualapai exemption in any manner that would warrant review by this Court.

Under the equal protection provision of the Fifth Amendment, one must be "deprived" of life, liberty or property in order to make out a colorable claim; that is, one must be

injured in some legally cognizable way by the challenged governmental action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In this case, and because of the unique structure of the Hualapai exemption, petitioner not only is not harmed, but actually benefits, from its existence.

The cases addressing racial classifications or affirmative action programs that this Court typically reviews invariably involve applicants competing for a finite resource, such as construction contracts, employment opportunities or educational admissions. The hallmark of these cases is that when Applicant A wins the contract, or the job, or the coveted admission to the university, Applicant B cannot receive that same benefit and is thereby injured by being deprived of the opportunity to complete for it on an equal footing. *Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 667 (1993).

That is not the case here. The Hualapai exemption does not create a "zero sum game" in which one applicant wins because the other applicant loses. Rather, the Hualapai exemption actually increases the total number of air tour opportunities available to petitioner (as well as to all other air tour operators), by exempting from the Limitations Rule all flights to and from the Hualapai Reservation. This expanded universe of opportunities is available to all applicants. And, as petitioner candidly admitted in its application for an extension of time to file its petition in this proceeding, every other air tour company that was a plaintiff in the court below has now entered into a contract with the Hualapai Tribe and is enjoying the benefit of increased air tour opportunities offered by the Hualapai exemption.

The same benefit is equally available to petitioner, as there is no numerical limit on the number of flights that can be exempted under the Hualapai provision of the regulation. Conversely, if the Hualapai exemption were struck down, it would actually have the effect of limiting available flight opportunities for petitioner and the other air tour companies; a result that would harm both the companies and the Hualapai Tribe.

Given this rather unique regulatory structure, and the fact that petitioner is not actually injured by its operation, this case lacks the recurring importance that warrants the Court's review.

## II. THE DECISION BELOW IS CONSISTENT WITH WELL-ESTABLISHED LAW

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court upheld a hiring preference for tribal Indians within the Bureau of Indian Affairs from a Fifth Amendment challenge. In doing so, the Court recognized the "unique legal status of Indian tribes under federal law," *id.* at 551; a trust relationship based upon the Constitution and imposing upon the United States fiduciary responsibilities to protect tribal interests. *Id.* at 551-52. This "special relationship" not only permitted Congress to enact legislation giving tribes certain preferences, but, in fact, as the Court readily acknowledged:

> [l]iterally every piece of legislation dealing with Indian tribes and reservations...single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were

> deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

*Id.* at 552.

The Court then carefully distinguished tribal preferences from racial classifications:

> [t]he preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

*Id.* at 553, n. 24. The Court concluded by holding that laws affording Indian tribes and their members special treatment are constitutional as long as those laws "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians...." *Id.* at 555.

The basic principals discussed in *Mancari* have been carried forward by this Court (and lower courts) in an unbroken series of cases upholding the constitutionality of preferences of various kinds for Indian tribes. *See Washington v. Washington State Commercial Fishing Vessel Association*, 443 U.S. 658 (1979) (upholding distinction between tribal and non-tribal applicants for fishing permits); *United States v. Antelope*, 430

U.S. 641, 645-46 (1977) ("federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications"); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84-85 (1977); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 479-80 (1976). And in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court summarized this line of authority by stating: "[i]t is settled that the unique legal status of Indians under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Id.* at 500-01 (internal quotations omitted).

Contrary to petitioner's contention, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), did not overrule *Mancari* and its progeny *sub silentio*. As the Court noted in *Adarand*, that case "concerns only classifications based explicitly on race, " *id.* at 213, and the majority opinion neither addressed nor even mentioned Indian tribes or the unique legal principals applicable to tribal preferences. *Adarand* held that federal racial classifications were to be reviewed under a strict scrutiny standard for equal protection purposes and expressly overruled two earlier cases – *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) – which had suggested that a lesser standard might be permissible for that purpose. What *Adarand* did not do, either expressly or impliedly, was overturn the unbroken line of authority from this Court that tribal preferences are political and not racial in nature. Indeed, in *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000), decided five years after *Adarand*, the Court cited and discussed *Mancari* and related cases with approval, noting that "as we have established in a series of cases, Congress may

fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.*

Petitioner also argues that the decision below conflicts with *Cayetano*. Petition at 12-14. But *Cayetano* offers petitioner little comfort. To the extent that it affirms the continuing validity of *Mancari* and its progeny, *Cayetano* undercuts petitioner's argument concerning the impact of *Adarand*. Moreover, the fact that *Cayetano* did not extend the *Mancari* analysis to native Hawaiians is based upon important factual distinctions: native Hawaiians do not have a federally-recognized tribal form of government or the constitutionally-based fiduciary relationship with the United States that characterize Indian tribes in the lower 48 states. As a result, *Cayetano* could decline to extend the *Mancari* analysis while remaining consistent with *Mancari* and its progeny, and with the decision of the court below.

Finally, petitioner contends that review by this Court is necessary because "a cloud of constitutional uncertainty" has been created in this area, Petition at 8, and that "[r]eviewing courts are struggling on what standard of review to apply." *Id.* at 11. In this regard, petitioner seriously overstates its case. In fact, every court to have considered the issue—including the court below and other recent federal and state decisions—have uniformly rejected petitioner's argument and have concluded that *Mancari* survived *Adarand* and that the rational relation standard is to be used in analyzing equal protection challenges to tribal preferences. *Montana v. Shook*, 313 Mont. 314, ____ P.2d ____ (Mont. 2002); *Flynt v. California Gambling Control Commission*, 129 Cal. Rptr. 2d 167 (Cal. App. 1 Dist., 2002); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal.

2002); *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d. 1012 (D. Az. 2001) *rev'd on other grounds*, 305 F.3d. 1015 (9th Circ. 2002).

As these recent decisions demonstrate, the law in this area continues to be well-settled and well-understood. Because the decision of the lower court is consistent with this body of law, and because it does not conflict with *Adarand, Cayetano* or any other decision of the Court, review is not warranted.

## III. THE REGULATION WAS PROPERLY ADOPTED IN ORDER TO FULFILL THE GOVERNMENT'S TRUST OBLIGATION TO THE HUALAPAI TRIBE.

Petitioner further contends that the FAA and the NPS acted improperly by addressing the particular concerns of the Hualapai Tribe in the Limitations Rule without express statutory authorization. Petition, Questions Presented, Number 2. Petitioner is wrong.

The agencies promulgated the Hualapai exemption in furtherance of the United States' well-established fiduciary obligation to Indian tribes in general and the Hualapai Tribe in particular. After determining that the Limitations Rule as initially proposed would have "significantly adversely impact[ed]" the Hualapai Tribe and its tourist-based economy, the FAA promulgated the tribal exemption to fulfill "the federal trust responsibility [i]n the economic development and self-sufficiency of the tribe," Petitioner's Appendix at F-31, and because it was "necessary in order to fulfill the government's trust responsibility to the Hualapai Tribe." *Id.* F-44.

The existence of a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), is well established. *See United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939). More recently, this Court has described the United States' trust obligation to Indian tribes as "one of the primary cornerstones of Indian law," *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 11 (2002) (quoting with approval from F. Cohen, Handbook of Federal Indian Law 221 (1982), and as a "principal that has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

*Mitchell* also makes clear that the federal government's obligation to fulfill this unique trust obligation to tribal governments does not require express statutory authorization. *Id.*, *citing Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980). In *Navajo*, the Court of Claims expressly rejected this contention, stating that:

> where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

*Id.* In this case, the regulatory exemption applies to activities taking place on the Hualapai Indian Reservation, on lands held in trust for the Tribe by the United States. Thus, no statutory authority was required in order to support the agencies' promulgation of the Hualapai exemption.[2]

Even if statutory authority were required, there is ample authority to support the agencies' action in this case. As discussed above, at pages 1-2, the FAA and NPS adopted the Hualapai exemption in order to protect the Hualapai Tribe's unique tourist-based economic interests. Thus, this provision was enacted in furtherance of Congress' well-established policy of promoting tribal economic development and self-sufficiency; a policy grounded in numerous statutes and repeatedly recognized by this Court. For example, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court noted that:

> both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development."

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[2] The regulation was also consistent with President Clinton's Executive Order of May 14, 1998, which directed federal agencies to acknowledge and incorporate the United States' "unique legal relationship with Indian tribal governments" in their rulemaking activities. Executive Order No. 13084, 63 Fed. Reg. 27, 655-27, 657 (May 19, 1998).

*Id.* at 334-35 (footnote and citations omitted); *see also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 and n. 19 (1987) ("These are important federal interests."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 and n. 10 (1980). *Mescalero, Cabazon* and *White Mountain* all cited the Indian Financing Act of 1974, as amended, 25 U.S. C. § 1451, *et seq.* and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq*, as examples of federal statutes expressly promoting tribal self-sufficiency.

More recently, in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*, Congress expressly stated that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal governments." *Id.* at § 2701 (4). Even more relevant in this context is the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4301 *et seq.* There, in its statement of findings and purpose, Congress noted that:

> (9) the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to:
>
> (A) encourage investment from outside sources that do not originate with the tribes; and
>
> (B) facilitate economic ventures with outside entities that are not tribal entities.

*Id.* at § 4391 (a)(9). It is precisely these types of contractual arrangements between tribes and non-Indian businesses that the Hualapai exemption was intended to promote. Petitioner's Appendix at F-102 to 103 (requiring tour operators to have a written contract with the Hualapai Tribe authorizing the use of Reservation lands in order to obtain benefit of the Hualapai exemption).

In summary, then, the agencies' promulgation of the Hualapai exemption was consistent with both the federal government's general fiduciary responsibility to Indian tribes and with Congress' express policy of promoting tribal economic development. As a result, this regulation raises no issue that merits this Court's attention.

## IV. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT.*

Petitioner contends that the court below applied *Mancari's* "unique Indian interests" test in a manner that conflicts with the Ninth Circuit's majority decision in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997). Petition at 15-17. In fact, however, when properly analyzed, *Williams* offers petitioner no support for this contention.

In *Williams*, the court was called upon to determine whether an administrative interpretation of the Reindeer Act of 1937, 25 U.S.C. § 500 *et seq.*, was correct. In that case, the Interior Board of Indian Appeals (IBIA) had interpreted the Act as barring non-Natives in Alaska from any involvement in the reindeer industry. Writing for the majority, Judge Kozinski

both acknowledged the continued validity of *Mancari* and its progeny and cataloged dozens of federal statutes providing preferences or special treatment for Indian tribes. *Williams*, 115 F.3d at 663-64 and n. 6. The unifying factor in these cases and statutes, according to Judge Kozinski, was that they all related to what he described as "uniquely Indian interests." *Id.* at 665. While the parameters of that concept are not defined with absolute clarity, see *Alaska Chapter, Associated General Contractors of America v. Pierce*, 694 F.2d 1162, 1166-68 (9th Cir. 1982), Judge Kozinski opined that they must generally relate to tribal lands, status, government or culture. *Williams*, at 664. Because the Reindeer Act "in no way relates to native land, tribal or communal status or culture," *id.*, and because the IBIA's interpretation of that Act constituted "a naked preference unrelated to unique Indian concerns," *id.*, Judge Kozinski reasoned that he could avoid the difficult constitutional questions created by those facts by interpreting the Reindeer Act as not barring non-Native participation. *Id.* at 666.[3]

In contrast, the Hualapai exemption was narrowly tailored to protect the interests of a single tribe after a rulemaking process that carefully weighed and analyzed those interests. See discussion above at pages 1-2. Therefore, even if Judge

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3 Judge Kozinski's analysis has been the subject of some academic criticism. Carole Goldberg, *American Indians and "Preferential" Treatment*, 44 U.C.L.A. L. Rev. 943, 960 (2002). It has also been described as "provocative dicta," *Flynt v. California Gambling Control Commission*, 129 Cal. Rptr. 2d 167 (Cal. App. 1 Dist. 2002) and the majority opinion in *Williams* has been characterized as an "exploration of equal protection issues without ultimately resolving them." *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1076 (D. Az. 2001) *rev'd on other grounds* 305 F.3d 1015 (9th Cir. 2002).

Kozinski's interpretation of the *Mancari* test were correct, the Hualapai exemption would meet that test. According to Judge Kozinski "[l]egislation that relates to Indian land, tribal status, self-government or culture passes *Mancari's* rational relation test...." *Id.* at 664. In this case, the administrative record demonstrates, and the court below found, that the Hualapai exemption was directly related to tribal lands, in that it exempts only "flights to and from the Hualapai Indian Reservation...." Petitioner's Appendix at A-24, n.8. Moreover, the exemption was specifically crafted to protect the governmental interests of the Hualapai Tribe. Petitioner's Appendix at F-28. These factual differences, then, distinguish the decision below from the majority's decision in *Williams*. Accordingly, there is no meaningful conflict between these cases that warrants the Court's review.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GLENN M. FELDMAN
*Counsel of Record*
MARISCAL WEEKS McINTYRE
& FRIEDLANDER, P.A.
2901 N. Central Avenue, Suite 200
Phoenix, Arizona 85012
(602) 285-5138

Attorneys for Hualapai Indian Tribe

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